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September 30, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MEDIA ACCESS PROJECT

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., NW
Washington, DC 20554

Re: *Ex parte* presentation in MM Docket 93-25

Dear Ms. Salas:

On September 29, 1998, Cheryl A. Leanza, Gigi B. Sohn, and Sabrina Youdim of Media Access Project met with Chairman William E. Kennard, Ari Fitzgerald, Legal Advisor to the Chairman and Rebecca Arbogast, Senior Legal Advisor in the International Bureau on behalf of DAETC *et al.* to discuss the Commission's implementation of Section 25 of the 1992 Cable Act.

Ms. Sohn and Ms. Leanza discussed the meaning of "editorial control" as it appears in Section 25(b) of the Act. Ms. Sohn and Ms. Leanza stated that this provision should be read as prohibiting DBS providers from selecting programmers or specific programming to fulfill the 4-7% channel capacity set-aside for noncommercial, informational and educational programming. In addition, Ms. Sohn and Ms. Leanza discussed the possibility of allowing DBS providers several options, in addition to the leased access model, to comply with the prohibition on the exercise of editorial control, including allowing them to create an industry-wide consortium or individual arm's length non-profit corporations that will select programming and programmers. Finally, Ms. Sohn and Ms. Leanza discussed the common law protection for DBS providers from liability for content chosen by a consortium or arm's length non-profit. In response to questions posed by the Chairman, MAP provided the attached memoranda to Mr. Fitzgerald, Ms. Arbogast, and Ms. Rosalee Chiara of the International Bureau.

Pursuant to section 1.1206(b)(2) of the Commission's rules, an original and three copies of this letter are being filed with your office today.

Sincerely,

Cheryl A. Leanza
Staff Attorney

Attachments
cc: Chairman William E. Kennard
Ari Fitzgerald
Rebecca Arbogast
Rosalee Chiara

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List A B C D E

September 29, 1998

From: Gigi B. Sohn
Cheryl A. Leanza

Re: Menu Options for Implementing Section 25(b) of the 1992 Cable Act

MAP, on behalf of DAETC *et al.*, has proposed that the Commission give DBS operators several options for compliance with 47 USC §335(b)'s directive that DBS providers "shall not exercise any editorial control over any video programming" on the four-to-seven percent capacity set-aside for noncommercial educational and informational programming. MAP does not favor any particular menu item over another: any of the three would satisfy Congress' mandate. Significantly, none of these choices would involve excessive regulation or micromanagement by the Commission.

Menu Item #1: Leased Access Model

This model was adopted by the Commission in its *Second Report and Order*, 12 FCC Rcd 5267 (1997). It would require DBS providers to make channel capacity available on a first-come, first-served basis if there is sufficient capacity to accommodate all available programming. In the likely event that there is more programming than available capacity, the DBS provider must choose the programming on an "objective, content-neutral basis." *Id.* at 5317. Thus, the DBS provider could hold a lottery, could base its decision on the amount of programming a programmer is willing to provide (*e.g.*, favor full-time programming), or base its decision on whether the programmer has already received some capacity for programming elsewhere on the DBS system.

Menu Item #2: Nonprofit Consortium

Two or more DBS providers could join together to create and fund an arms-length 501(c)(3) nonprofit consortium that would exercise full editorial control over the set-aside. To ensure adequate separation of editorial control from the DBS providers, the Commission should adopt three simple requirements:

- require that no more than one-third of the members of the consortium's Board of Directors have any financial interest in, or other relationship with, any DBS provider (the Commission can use its attribution rules and other applicable rules, *i.e.*, cross interest rules, to determine what relationships are impermissible in this context);

- require that no board member have any financial interest in, or other relationship with, any programmer seeking access to the Section 25(b) capacity (this will likely not be a problem if the Commission limits access to nonprofit programmers),

  and/or

- approve, as a whole, the DBS providers' initial choice of a self-perpetuating Board of Directors.[1]

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[1] The members of the Board of Directors could also certify that they will comply with the statute's prohibition on the exercise of editorial control by DBS providers.

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This consortium would then function much like local access corporations that choose programming for Public, Educational, and Governmental channels. The boards of these corporations (which usually number between nine and thirteen persons), often do include some (but not majority) industry membership, and create their own procedures and mechanisms for choosing and funding programming. They do not produce programming. The consortium board, like access corporation boards, could, *inter alia*, develop by-laws and dispute resolution procedures, create a programming advisory committee to assist in programming decisions, hire staff, and raise money from DBS operators and foundations to fund both the consortium and programming.

The Commission should leave the details of programming the set-aside capacity to the consortium, limiting Commission involvement to determinations as to whether violations of law or regulation have occurred. In addition, MAP has suggested that the consortium be required to submit a report on its operations to the Commission every two years.

Menu Item #3: Arm's Length Nonprofit Corporation

A DBS provider could choose either to use an existing arms-length nonprofit corporation, or to create its own arms-length nonprofit to program the set-aside. Indeed, one such nonprofit corporation, "Educating Everyone," already exists, and will program Echostar's (and perhaps other DBS providers') Section 25(b) capacity.

Because the risk of DBS provider influence would likely be greater in a single nonprofit (particularly if the DBS provider creates the corporation), the Commission should require the proportional representation and voting power of the DBS provider be less than it is for the consortium, *e.g.*, no greater than ten or twenty percent. The other limitations adopted for the consortium should also apply to the nonprofit. Like the consortium, this nonprofit would not be a programmer itself, but would select (and possibly help fund) programming for the set-aside.

Educating Everyone serves as a good example of how such a nonprofit might be structured. It is a 501(c)(3) nonprofit foundation that was started with a $1 million grant from Echostar. Its Executive Director, Scott Zimmer, is a former Echostar employee who has no financial or other interest in Echostar. The foundation's Board of Directors, approximately four in number, will have no association with, or financial interest in, any DBS provider. In addition to the Board of Directors, the foundation will have a Board of Advisors. Programming decisions will be made by the Executive Director and a "User Committee." The foundation itself does not produce programming. Mr. Zimmer has offered to answer any questions the staff might have about the foundation's operations. His phone number is 941-366-8686.

MEMORANDUM

September 29, 1998

From: Cheryl A. Leanza
Gigi B. Sohn

Re: Liability for Programming Transmitted on the DBS Noncommercial Educational and Informational Set-aside

DBS providers are not liable for the content of programming transmitted on the capacity set-aside for noncommercial educational and informational programming created in Section 25(b) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). 47 USC § 335(b).

I. Introduction

Some parties argue that DBS providers may incur liability for the content of programming transmitted on the noncommercial educational and informational set-aside, and thus argue that they should be granted control over such programming. These parties base their argument on a comparison between the Communications Act's ("the Act's") DBS provisions and the Act's cable television leased access and public, educational, and governmental ("PEG") provisions. The DBS provisions and the cable access provisions use identical language to deny the exercise of editorial control to DBS providers and cable operators. *Compare* 47 USC §§ 531(e), 532(c)(2) *with* 47 USC § 335(b)(3). The cable provisions, however, explicitly exempt cable operators from liability for any programming transmitted on PEG and leased access channels. 47 USC § 558. Parties favoring additional control for DBS providers argue that the absence of an immunity provision in the DBS portion of the Act supports an inference that DBS providers should be allowed to exert control over the programming on the noncommercial set-aside.

Reliance on the differences between these two portions of the Communications Act is misplaced for the two reasons described in detail below. First, Supreme Court precedent holds that, when the Communications Act deprives an entity from exercising editorial control over certain programming, the Act contains an implied grant of immunity from liability for the substance of such programming. Second, the Commission has held that a statutory prohibition on the exercise of editorial control must be enforced regardless of whether the broadcaster or cable operator could be held liable for the transmission of defamatory or libelous material.

II. Entities that Do Not Exercise Editorial Control Over Programming are not Liable for the Content of Such Programming.

Under Supreme Court precedent, Section 25(b) contains an implied grant of immunity for DBS providers. In 1959, the Supreme Court considered Section 315 of the Communications Act,

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which contains provisions very similar to those contained in Section 25(b).[1] *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) ("*Farmers Union*"). The Supreme Court held that, because section 315(a) deprives broadcasters of editorial control over political broadcasts carried pursuant to that section, broadcasters could not be held liable for defamatory statements contained in those broadcasts. *Farmers Union*, 360 U.S. at 531; *see also Lamb v. Sutton*, 274 F.2d 706 (6th Cir. 1960) (applying *Farmers Union*). The Court concluded that, to impose liability for programming broadcast under Section 315(a), "would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." *Id.* Section 25(b) compels the same conclusion.

The exemption from liability is not limited to federal case law interpreting the Communications Act. The dissenting justices in *Farmers Union* dissented from the case, in part, because under libel law in most states, a broadcaster could not be held liable for the content of material over which it could exercise no control because "it lacked intent to communicate the defamation." 360 U.S. at 542 (Frankfurter, J., dissenting). Current law continues to hold that, if the distributor of defamatory matter can show that it did not know and reasonably could not have known the matter was defamatory, the distributor is not liable. 50 Am.Jur.2d *Libel and Slander* § 369 (1995).

The absence of an explicit statutory exemption from liability for DBS providers does not alter this analysis. In *Farmers Union*, the Court held that the failure of Congress to adopt an exemption from liability for programming broadcast pursuant to Section 315(a) was of no consequence. The Court concluded "whatever adverse inference may be drawn from the failure of Congress to legislate an express immunity is offset by its refusal to permit stations to avoid liability by censoring broadcasts." 360 U.S. at 532. It also concluded that "more than balancing any adverse inferences drawn from congressional failure to legislate an express immunity is the fact that the Federal Communications Commission--the body entrusted with administering the provisions of the Act--has long interpreted § 315 as granting stations an immunity." *Id.* at 532-33. This analysis is directly applicable to Section 25(b). Congress chose to follow the same format in Section 25(b) that it followed when adopting Section 315(a). The same result should follow. Any doubt as to DBS providers' liability for programming transmitted on the set-aside capacity can be eliminated by a Commission decision concluding that, under current law, DBS providers are immune.

The Commission has previously taken similar action on its own initiative. In adopting cable leased access rules in 1972, the Commission prohibited cable operators from exercising editorial control over such channels. *Cable Television Report and Order*, 36 FCC 2d 143, 195-96, 240-41

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[1] Section 315 of the Communications Act requires broadcasters to grant all legally-qualified political candidates equal opportunities to broadcast messages subject to certain requirements. *See generally* 47 USC § 315. Section 315(a) prohibits broadcasters from exercising any "power of censorship" over such broadcasts. *Id.* at § 315(a).

(1972).[2] When it adopted those rules, the Commission explicitly dismissed industry arguments that a prohibition on editorial control should not be adopted because it might unjustly impose liability for statements over which cable operators were being deprived editorial control. First, the Commission relied upon common law to conclude that cable operators' fears were unfounded, stating "there is little likelihood of . . . a criminal suit in a situation where the system has no right of control and thus no specific intent to violate the law." *Id.* at 195 (citation omitted).[3] Second, the Commission found that, "state law imposing liability on a system that has no control over these channels may unconstitutionally frustrate federal purposes." *Id.* at 196. Thus, when the Commission was free to impose or not impose a prohibition on editorial control, it nonetheless chose to impose such a prohibition in spite of industry concerns that it might incur liability under state libel law. The Commission would be acting arbitrarily to now conclude that a statutory prohibition on the exercise of editorial control should be weakened in light of Congress's decision to leave the issue of liability to common law.

III. The Commission has Previously Concluded that the Plain Language of a Statute Cannot be Defeated by a Lack of an Explicit Grant of Immunity.

The Commission's long and consistent administration of the editorial control provision of Section 315(a) is powerful authority for the wisdom, as well as the legality, of affording immunity. The Commission has previously determined that Section 315(a)'s statutory prohibition on the exercise of editorial control must be enforced regardless of whether the broadcaster could be held liable for the transmission of defamatory or libelous material. In *Port Huron*, the Commission held: "the prohibition on section 315 against any censorship by licensees of political speeches by candidates for office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages." *Port Huron Broadcasting Co.*, 12 FCC 1069, 1074 (1948). The Commission later reinforced the ban on censorship, stating: "Nor will we accept the argument that state statutes or common law on the subject of libel in some way supplant or modify the unqualified pronouncement of Congress on the use of interstate facilities of radio by candidates

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[2] Although the Commission's authority to promulgate such rules was ultimately struck down, *FCC v. Midwest Video*, 440 U.S. 689 (1979), the Commission's conclusions regarding the potential liability associated with a validly-adopted prohibition on the exercise of editorial control were not questioned.

[3] An intent to violate the law has been consistently read into obscenity statutes to preserve their constitutionality. *See U.S. v. X-citement Video, Inc.*, 513 U.S. 64 (1994) (holding that, despite ambiguous statutory language, a defendant must know that an actor is a minor to be convicted under a child pornography distribution statute); *Smith v. California*, 361 U.S. 147 (1959) (finding unconstitutional a local ordinance making it illegal for a bookseller to sell an obscene book because it did not contain a requirement that the bookseller know the book is obscene); *Tallman v. U.S.*, 465 F.2d 282 (7th Cir. 1972) (holding that the federal prohibition on the broadcast of obscene material contained in 18 USC § 1464 includes an implied element of *scienter*). Statutes frequently include a requirement that obscene material be transmitted "knowingly." *See, e.g.*, 18 USC § 1468 (prohibition on transmission of obscene material via cable or subscription television).

in making political broadcasts." *WDSU Broadcasting Corp.*, 7 R.R. 769, 773 (1951).

IV. Conclusion

Both Supreme Court precedent and the Commission's own precedent compel the Commission to find that, because Section 25(b) deprives DBS providers of editorial control over programming broadcast on the channel capacity set-aside for noncommercial educational and informational programming, DBS providers are immune from liability for the content of programming transmitted pursuant to that section.